IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

NORTHERN MINING CORPORATION (a corporation),

Petitioner,

—against—

MAX TRUNZ,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions of Courts Below.

There was no opinion by the District Court after a year's deliberation.

The opinion by the Circuit Court of Appeals is printed at pages 358-380 of the Record and is reported in 124 Fed. (2d) 14.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended February 13, 1925.

The date of the decision sought to be reviewed is December 10, 1941.

III.

Statement of Case.

The principal facts have been set forth in the petition. The pertinent additional facts will be set forth in the points following.

IV.

Specification of Errors.

I. The Circuit Court of Appeals erred in holding that the written instrument dated June 28, 1934, between Glengarry Mining Company and Max Trunz (Ex. A, R. 50) purporting to be executed by Glengarry Mining Company, a corporation, was a valid agreement of said company.

II. The Circuit Court of Appeals erred in holding that the instrument dated July 2, 1934 (Plaintiff-Respondent's Ex. 7, R. 107) was a valid deed from Glengarry Mining Company to Max Trunz.

V.

The Applicable State Statutes.

The Revised Codes of Montana (1935) so far as material here provide in Sections 5933 and 6004 as follows:

> "5933. Corporate Powers and Business Exercised by Board of Directors—Number and Membership of Board quorum. The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a

board of not less than three nor more than thirteen directors, to be elected from among the holders of stock, * * *."

"6004. PROCEDURE FOR SALE, LEASE, ETC., OF CORPORATE PROPERTY.

* * *

Thereupon any proposition for the sale, lease, mortgaging, exchange, or other disposition of the whole or any part of the property and assets of every kind and description of such corporation, for property, or for the whole or part of the capital stock of any other corporation, whether domestic or foreign, or otherwise, may be considered and acted upon by said meeting, and if stockholders representing at least two-thirds (⅔) of the whole number of shares of the capital stock of said corporation then outstanding, and of record on the books of the corporation, and entitled, as aforesaid, to vote at such meeting, appearing at said meeting in person or by agents or proxies, as above provided, vote in favor of any such proposition, whether proposed by the directors or trustees, or not, as said stockholders may see fit, which proposition shall be in the form of a resolution specifying the particulars thereof and entered on the minutes of said stockholders' meeting, the said proposition or resolution shall be taken and adopted as the act of the corporation, and shall be carried out as such, and shall be approved and adopted by the board of directors or trustees; * * * upon the adoption and approval by the board of directors or trustees of the corporation of such proposition or resolution, the corporation and its officers shall have full power and authority to do all acts and to execute all conveyances or other instruments in writing which are necessary or proper

to carry out the said proposition or resolution, and the sale, lease, mortgage, exchange, or other conveyance of the whole or any part of the property of said corporation, authorized by said proposition or resolution, shall thereupon take effect and have the same force as if all the stockholders of the corporation had consented thereto; provided, that nothing contained in this act shall be deemed to limit or restrict the powers of the board of directors or trustees of such corporation in relation to the disposition of property or the conduct of business * * *."

Argument.

POINT I.

The alleged agreement dated June 28, 1934 (Ex. A, R. 50) was not a valid instrument binding the corporation Glengarry Mining Company.

The alleged agreement was executed in the following form:

"GLENGARRY MINING COMPANY
By (Sgnd) MARTIN R. GUENZEL
Pres
(Sgnd) CARL H. KECK
Treasurer
(Sgnd) MAX TRUNZ" (R. 12).

It will be noted that the foregoing paper is not acknowledged nor is the corporation seal affixed and the witness clause contains no recital that the officers were authorized by the directors to execute the instrument on behalf of the corporation.

There is no evidence that the board of directors at a board meeting authorized the president and treasurer of the corporation to execute the foregoing instrument.

Section 5933 of the Revised Codes of Montana, hereinabove set forth, provides that the corporate powers, business and property of all corporations formed under the Act must be exercised, conducted and controlled by the board of directors of such corporations.

The Supreme Court of Montana, in *Pioneer Minerals Corporation, et al.* v. *Larabie Bros. Bankers, Inc., et al.*, 99 Mont. 358; 49 Pac. (2d) 884 at 886 said:

> "The Board of Directors, acting in the manner prescribed by law, and not the stockholders of a corporation, conducts and controls the business and property of the corporation."

It is apparent from the record that this so-called agreement was *never authorized by the stockholders or the directors of the corporation,* but was the plan and device of the president, also a director, and Keck, a director.

The directors of a corporation bind it only when acting as a board or body.

Sections 5933-5938, R. C. M. 1935.

The acts or statements of individual directors outside of a meeting are of no effect and do not bind the corporation; a director has no such power merely by virtue of his office as such.

Raish v. *Orchard Canal Co.*, 67 Mont. 140; 218 Pac. 655.

No presumption attaches of authority, merely by the signing, where the seal of the corporation is omitted.

> *Genzberger* v. *Adams*, 62 Mont. 430; 205 Pac. 658, at 660.

The Circuit Court of Appeals in its opinion stated, on the question of whether or not the advancing of the $25,000 by the respondent was a loan:

> "On this point the evidence is in conflict * * *" (R. 363).

This statement is wholly unwarranted. There is not one word or scintilla of evidence in the entire record even attempting to explain, contradict or deny this letter of the respondent dated June 10, 1935 (R. 254), which was written **after** the execution of the alleged deed. In other words the Circuit Court of Appeals tells the respondent he didn't make a loan, he bought the property! What a travesty on justice! More than that respondent's letter of June 10, 1935, written when he already had the deed, shows that he recognized, as the lower courts failed to do, that the transaction was still a loan.

POINT II.

Plaintiff-respondent's Exhibit 7 (R. 107), the alleged deed purporting to be executed July 2, 1934, by Glengarry Mining Company is invalid as a conveyance of the corporation's property.

While the instrument appears to be signed by the corporation by the president and assistant secretary and is sealed and has a corporation acknowledgment attached, there is no evidence that the execution of this instrument

was authorized by either the directors or stockholders of the corporation.

The authorities and argument in Point I are applicable to the execution of this instrument and they show that this is not a valid conveyance.

This was an attempt to dispose of one of two of the developed mining properties of the Glengarry Mining Company (R. 180) in violation of the express provisions of Section 6004 of the Revised Codes of Montana.

Section 6004 above quoted, provides in clear and explicit language that

> "* * * any proposition for the sale, lease, mortgaging, exchange, or other disposition of the whole or any part of the property and assets of every kind and description of such corporation * * * may be considered and acted upon by said meeting, and if stockholders representing at least two-thirds (⅔) of the whole number of shares of the capital stock of said corporation then outstanding, and of record on the books of the corporation, and entitled, as aforesaid, to vote at such meeting, appearing at said meeting in person or by agents or proxies, as above provided, vote in favor of any such proposition * * *."

The statute then provides the manner by which the determination of the stockholders shall be carried into effect. The Circuit Court of Appeals in construing this section relied upon the provision which reads as follows, which it has italicized in the footnote (124 Fed. (2d) at p. 19):

> "* * * provided, that nothing contained in this act shall be deemed to limit or restrict the powers of the board of directors or trustees of such corporation in

relation to the disposition of property or the conduct of business."

The foregoing provision manifestly has no application to the attempted conveyance of the mining properties described in Exhibit 7, because *there is no evidence in the case to show that the consent or approval of the board of directors* of the Glengarry Mining Company *had ever been given* to the president and asst. secretary to execute such an instrument.

The Supreme Court of Montana had occasion to apply the statute (Sec. 6004) in *Hanrahan* v. *Andersen et al.*, 108 Mont. 218. The Supreme Court rendered a lengthy opinion, setting out the purposes of the statute, and the law as it existed before its enactment. In that case conveyances were made without compliance with the statute, and an action was brought to have them set aside. In deciding the question the Supreme Court said, page 231:

"It has been held that the directors, unless specially empowered, could not sell any portion of the estate of the corporation essentially necessary for the transaction of its customary business. (2 Thompson on Corporations, secs. 1289, 1290; *Rollins* v. *Clay*, 33 Me. 132.) The reason for the rule is that the purpose of a solvent corporation and of its stockholders is not to be defeated in whole or in part by the directors, nor even by the stockholders without unanimous consent, unless expressly provided by law. (*Forrester* v. *Boston & Mont. Com. C. & S. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.) It was to relax the rule in the latter respect so as to prevent a small minority from thwarting the will of the overwhelming majority that the statute now appearing as section 6004, *supra*, was enacted; and to make the relaxation of the law effective, its requirements

must be essentially complied with. (*Wortman* v. *Luna Park Amusement Co.*, 61 Mont. 89, 201 Pac. 570.)

Defendants contend that these transfers to Consolidated and to Andersen do not come within the provisions of section 6004, because Capital retained its official books, records and office, and thereafter transacted business and was shown thereafter to have had other property. The argument overlooks the reason for the rule. If the question were merely whether the corporation had other property after the transaction, no sale could ever be objected to by a minority stockholder, for in any sale other property is received as consideration. Furthermore, the statute refers to the sale of 'the whole or any part' of the property. Every part of the statute must be construed as having some meaning, and since the obvious purpose of the statute was to enlarge corporate powers to sell property, it must be construed as authorizing sales not already within the powers of the board of directors because not in the furtherance and in the ordinary course of the corporation's estalished business. * * *

The conveyance to Consolidated was a nullity, for the stockholders' meetings purporting to authorize were held on insufficient notice. Whether the other defects indicated in those proceedings were material need not be considered."

and at page 233:

"Furthermore, the trust deed to Andersen was obviously void because of failure to comply with the provisions of section 6004."

The Supreme Court declared that transfers without compliance were nullities, that they were "obviously void".

No stronger language could be used, and this decision clearly shows that the alleged deed did not convey any title.

The Circuit Court of Appeals attempted to distinguish the *Hanrahan* case, stating:

> "It is also apparent from the record in that case that the transactions involved virtually all of the corporate assets and greatly affected the established corporate business, and therefore came well within that class of transactions necessitating compliance with the statute."

This does not distinguish the case but on the contrary clearly shows its application to the instant case. The attempt by the officers of the Glengarry Company to convey the property of the company to this respondent was not the sale of personalty or even of a small piece of real property, but a transfer of a large part of the corporation's assets.

CONCLUSION.

It is respectfully submitted that the case merits review by this Honorable Court and that a writ of certiorari should be issued, as prayed for.

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